No. 2652

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK of Centralia, Washington,
Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON and IZELLA J. SMITH,
Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant.

1408 Hoge Building,
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Washington Printing Co.

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STATEMENT.

In August, 1914, John E. Sundquist was a depositor of the United States National Bank of Centralia in the amount of $3,000. This deposit was evidenced by three certificates of deposit of $1,000.00 each. (Tr. p. 20) Sundquist desired to pay a mortgage of $1,296.00, which was owing from his son-in-law Gustafson to a Miss Smith. On August 31, 1914, Sundquist surrendered to the bank two of the certificates of deposit, receiving from the bank $604.00 in cash, a certificate of deposit for $100, and a receipt for $1,296.00. (21)

As to the $1,296.00, Sundquist instructed the bank to issue a certificate of deposit for that amount in favor of Miss Smith (24). Thereupon, the bank issued its certificate of deposit as follows (24):

"The United States National Bank.

Centralia, Wash., Aug. 31, 1914. No. 12215

"Izella J. Smith has deposited in this Bank Twelve Hundred Ninety-six Dollars, $1,296.00 payable to the order of herself—on return of this certificate properly indorsed.
U. S. National Bank.

J. W. Daubney, *Cashier.*"

Not subject to check."

The bank wrote Miss Smith that the sum had been deposited with it to pay the note and mortgage, and asked her to forward the note, mortgage, and satisfaction to the bank. (27) In response to this notification, Miss Smith sent the note, mortgage and satisfaction through the Olympia National Bank to the United States National Bank at Centralia. She never received the certificate of deposit and the note and the release of mortgage have never been returned to her. (28) There is no evidence that she ever demanded the return of the papers sent by her.

The United States National Bank of Centralia was declared insolvent by the Comptroller of the Currency on September 21, 1914, and the appellant Titlow, is its duly appointed and qualified receiver. (8) The $1,296.00 as evidenced by the certificate of deposit has never been paid to Sundquist, Smith, or Gustafson. (30) This suit is brought by Sundquist to enforce preferential payment to him of $1,296.00 out of the assets of the insolvent bank. (7)

SPECIFICATIONS OF ERRORS.

1. The plaintiff has no interest in the subject matter of this litigation, the alleged right which he is attempting to assert belonging, if to any one, to the defendant Izella J. Smith.

2. The District Court erred in finding and adjudging that the change in the form of credit from certificate of deposit in favor of the plaintiff to a certificate in favor of defendant Smith, without the deposit of any actual money, was sufficient basis for the assertion of a preferred claim against the assets of the bank in the hands of the defendant receiver.

3. The District Court erred in ordering and directing the receiver of the bank to pay to the plaintiff the sum of $1,296, together with the costs and disbursements, out of the funds then in his hands as receiver.

4. The District Court erred in rendering a decree in favor of the plaintiff, which decree is contrary to the testimony and against the law, because the equity in the case entitled the defendant receiver to a decree of dismissal.

ARGUMENT.

A national bank fails. Its depositors cannot be paid in full. The bank has wronged *all depositors*. Its creditors frequently assert that their claims are entitled to preference. This is based upon the theory of a trust fund held by the receiver which does not belong to the *general* creditors. If the preference is

to be allowed, it must come out of the fund for distribution among the other creditors. Congress has recognized the desire of claimants to be paid in full at the expense of others. It recognizes also the maxim that equality is equity, and has intended to prevent all unjust preferences. Sec. 6236 provides for "ratable dividends upon all claims proved to the satisfaction of the Comptroller or adjudicated in a court of competent jurisdiction." Sec. 5242 prohibits all attempts by the bank to prevent a just and ratable distribution of the assets among the creditors. If, however, by reason of any established equitable principle, a claimant is entitled to a fund in the hands of the receiver, it should be paid in full. This doctrine is based upon the theory that the receiver is in possession of funds equitably belonging to the claimant.

Where a claimant has made a deposit in a bank which subsequently becomes insolvent, his claim for preference is usually based upon one of two grounds: *First.* That the deposit was made for a specific purpose without the right of the bank to commingle his deposit with other funds of the bank; and, *second,* that the deposit was received by the bank when it was known to be hopelessly insolvent. We are not concerned with the second principle as the question of the solvency or insolvency of the Centralia bank at the time of the transaction is not involved in this case.

In order to entitle the claimant to a preference on the first ground, it is necessary for him to establish (a) that there *was* a trust fund created by his deposit, and (b) that this trust fund can be followed *into the possession of the receiver, and that the assets of the insolvent bank are augmented thereby.*

Many of the courts have failed to recognize the distinction that before a trust fund can be *traced,* a trust fund must *exist.* Your Honors recognized this principle when you said, in *Spokane County* vs. *First National Bank of Spokane,* 68 Fed. 979:

"There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession or in a substituted form."

No Trust Fund.

Originally the bank owed Sundquist $3,000.00, evidenced by three certificates of deposit. At the time of the transaction of August 31, 1914, no *additional money* was deposited by Sundquist with the bank. There was a *mere shifting of the credits already existing* by a changing of the credit of

$3,000.00 by (a) withdrawal of $604.00 cash; (b) the retention of one certificate of deposit of $1,000.00; (c) the issuing of a new certificate for $100.00 to Sundquist; and (d) a new certificate of deposit for $1,296 in favor of Izella J. Smith, which certificate was payable to the order of herself "on return of this certificate properly indorsed."

We are immediately impressed with the fact that the net result of this transaction was *to decrease the assets of the bank to the extent of the withdrawal of the cash,* $604.00. After August 31, instead of owing $3,000.00, *the bank owed somebody only* $2,396.00. Nor do we resort to any fiction wherein a depositor actually withdraws cash and *redeposits* it to the credit of some one else. No money passed over the counter of the bank *except the actual withdrawal of the* $604.00 *cash by Sundquist.* No money was counted, no funds were set aside; it was a mere matter of bookkeeping, whereby the new certificate of deposit for $1,296 was issued by the bank. It is evident that prior to the transaction of August 31, Sundquist was a creditor of the bank. He is not asserting any preference claim for the $1,000 evidenced by the certificate of deposit issued to him prior to August, 1914, nor even for the new certificate of $100.00 issued to him on August 31st. This $1,100.00 he has asserted as a general claim. (23) But

he asserts that the shifting of the credit and the issue of the new certificate for $1,296.00 changed the relation of debtor and creditor and constituted the bank his bailee, and that so far as *that certificate* is concerned, Sundquist is entitled to a preferential claim. Of what fund did the bank thereupon become bailee? No specific coin was set apart, no funds were earmarked. It was never contemplated that any identical separate money should be forwarded to Miss Smith. A bailee, like an agent, has possession of a specific res. If he wrongfully deals with this res of his bailor or principal, he is guilty of a conversion. What specific $1,296.00 would it have been possible for the bank to convert to its own use?

In *Marine Bank* vs. *Fulton Bank,* 2 Wall. 252, the court said:

> "All deposits made with banks may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with his title to the money and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not that of the former class. It must be of the latter."

The mere shifting of credit, or the change in form of an existing credit, does not change the relation from debtor and creditor to trustee and cestui que trust.

In *Hawkins* vs. *Cleveland C. A. & St. L. Ry. Co.,* 89 Fed. 266, C. C. A., 7th Cir., the railroad company had a deposit of some $50,000 with the bank. Desiring one Haughey to become surety on certain bonds on behalf of the Railroad Company, and in order to protect Haughey against any liability on account of his undertaking, it was agreed between the railroad and the bank that $18,000 of the $50,000 deposit should be set aside for that purpose. This was done by the Railroad Company drawing a check on its deposit of $50,000, which was redeposited to the credit of Haughey, Trustee. Thereupon the bank issued its certificate of deposit, reciting that the Railroad Company had made a special deposit of $18,000 in the bank in the name of Haughey, Ttrustee, to secure him as surety on a bond. The liability on the bond having terminated and the bank in the meantime having become insolvent, the railroad company brought suit against the receiver of the bank, asserting a preferential claim as to this $18,000, on the ground that it was a special deposit or bailment to be held by the bank. That court said:

"If, as contended by its counsel, the bank remained simply a debtor for the $18,000, as well after

as before the transfer of the credit from the appellee to Haughey, Trustee, then Haughey, Trustee, would not be entitled to a preference over other creditors, nor would appellee or any other person, merely because it or he sustained to Haughey, Trustee, the relation of beneficiary, be entitled to a preference. * * * We think the bank remained after as before the deal a debtor for the $18,000. The credit was changed from the account of one depositor to that of another. The receiver is answerable only for the distributive share appropriate to any balance owing from the bank on the account of Haughey, Trustee, without preference and as a general creditor."

In *Anhaueser-Busch Brewing Association* vs. *Clayton,* 56 Fed. 759, it appeared that the Brewing Company drew its draft on one Morris and sent the draft to the McNab Bank for collection and return. Morris paid the draft *with his check on the McNab Bank.* Morris had at that time about $3,000 to his credit as a depositor in the McNab Bank. The McNab Bank forwarded to the Brewing Company its exchange drawn on the Hanover National Bank of New York, which, being sent forward by the Brewing Company for collection in New York, was protested for non-payment, the McNab Bank having failed. A claim for priority of the protested draft was asserted by the Brewing Company against the insolvent bank. That court said:

"Accepting Morris's check in payment of his debt to the appellant (Brewing Company) and charging the amount of it on Morris's account with the bank, *was but a shifting of his liability,* and he

became appellant's debtor and assumed the obligation to pay to it the amount of the check less exchange. There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money, but on the contrary, it is conceded that it is indistinguishable from the mass of the bank's own money and cannot be traced to and identified in the hands of the receiver. This being so, appellant has no better equity than the other creditors of the bank and is entitled to no priority over them."

In *Warren* vs. *Nix,* 135 S. W. 896, 97 Ark. 374, the court said:

"A deposit is therefore in law, as well as in fact, the placing or leaving with a banker a sum of money for safe keeping. If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, then it is a special deposit, but if the agreement is that the money shall be returned, not in the specific coin or currency to the depositor, but in an equal sum, it is a general deposit. In either case the money is deposited for safe keeping, and the only distinction between the two kinds of deposit is the character of the return that is to be made thereof to the depositor, whether it shall be returned in the identical thing deposited or in kind."

The distinction between a general and a special deposit is universally recognized. As said in *Butcher* vs. *Butler,* 114 S. W. 564, 134 Mo. App. 61: "A general deposit is where the bank is given the custody of the money deposited with the intention, express or implied, that the bank is not to be required to return the identical money, but only its equivalent. In such cases the legal title to the money passes to

the bank, and the depositor, divested of his title, must rely on the obligation of the bank to repay him. In the case of a special deposit, the bank merely assumes the charge and custody of the property, without authority to use it, and the depositor is entitled to receive back the identical thing deposited. The title remains with the depositor, and if the subject be money, the bank has no right to mingle it with other funds."

See also *Boyer* vs. *American Trust & Savings Bank,* 41 N. E. 622, 157, Ill. 62.

The court takes judicial notice of the customary dealings of banks and the handling of accounts. A bank is not like an ordinary agent entrusted with funds of its principal. It is not contemplated by the depositor that the *identical money* will be forwarded but that a like amount of coin or a credit will be utilized. (*Marine Bank* vs. *Fulton* supra.) By the shifting of the credit and the issuance of the certificate of deposit for $1,296.00 it was neither the agreement expressed or implied that the bank should set aside that specific amount in coin. *The expressed agreement was directly to the contrary.* The certificate of deposit recited that it would pay Miss Smith or order that sum upon demand. This certificate was the promissory note of the bank to pay

out of the general mass of moneys in its possession either to the holder of the certificate or to her order.

If no trust fund in fact existed, it is not necessary to pursue further the question whether a trust fund once established can be traced into the hands of the receiver of the insolvent bank.

No Augmentation of Assets.

One rule of almost universal application by the federal courts is that, in order to entitle a claimant to recover a trust fund in the hands of the receiver of an insolvent national bank, it must appear by *convincing proof that the funds actually coming into the hands of the receiver have been augmented by such trust fund.* Even if a trust fund at one time existed, it cannot be asserted against the bank's receiver unless it can be traced into his posession. The fund being lost, the claimant is relegated to the position of a general creditor.

This court said:

"In carrying out the rule (the one mentioned above) when it comes to proof, the owner must assume the burden of ascertaining and tracing the trust fund, showing that the assets which have come into the hands of the trustee *have been directly added to or benefited by an amount of money* realized from the sales of the specific goods held in trust. * * * We do not mean to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, for it will not go farther

than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate and which represents the proceeds of the specific property entrusted to the bankrupt."

In re Acheson Co. 170 Fed. 427.

Again your Honors in *In re Dorr,* 196 Fed. 292, at page 98, said:

"Money due from a bankrupt as trustee and which cannot be distinguished from any other moneys in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or otherwise misapplied them, cannot be considered as property held by the bankrupt in trust."

Citing cases.

The trust fund theory is based upon the principle that the assets in the hands of the receiver have been so increased that the allowance of the preference claim will not decrease the dividend to general creditors. If an augmentation of the insolvent's assets in the possession of the receiver has not occurred, the claimant is not entitled to a preference, for the simple reason that the allowance of the preferred claim would be at the expense of the general creditors.

In *Beard* vs. *Independent District Pella City,* 88 Fed. 375, the Circuit Court of Appeals for the 8th Circuit Court said:

"Unless it appears that the fund or estate coming into the possession of the receiver has been augmented or benefited by the wrongful use of trust funds, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the Supreme Court of Iowa and the Supreme Court of the United States."

The facts in that case showed that the claim of the city to a trust fund of some $4,000.00 grew out of two credits entered on the books of the bank, which credits did not represent actual cash paid into the bank, but *represented checks, given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the checks and then entered to the credit of the treasurer of the school district.*

"This balance is made to appear to be due to the school district by entries upon the books *which neither increased nor diminished the cash held by the bank.*"

And it appeared that the amount of cash held by the bank was not increased by this transaction, but

"remained at just the figure it would have shown if the interchange of credits between the treasurer of Marion County and the treasurer of the school district had not taken place."

Under these facts that court said:

"Can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund be-

longing to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors?"

"It is claimed in the argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money therefor, and had then deposited the money in the bank as the money of the school district, *but this was not in fact done,* and against the creditors whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?"

"If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly if the school district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank holding an accepted or certified check. It could certainly not assert that the accepted check had become a trust fund which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof, and in effect that was all that was done in this case, in that when the check was drawn, the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good and became bound to pay the amount thereof when called upon by the treasurer of the district."

"But where the district attempts to avoid the position of creditor and assume that of the owner of a trust fund, and as such to assert a preferential right

to payment in full out of the cash funds coming into the hands of the receiver to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to-wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries in books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund."

The *Beard* case has been frequently cited with approval. Judge Sanborn, in delivering the opinion of the same court in *Empire State Surety Co.* vs. Carroll County, 194 Fed. 593, at page 606, said:

"Proof that these checks augmented the cash that went into the hands of the receiver or that they produced cash which he obtained, was indispensable to any preference on their account. But checks of third persons on the bank with which they are deposited, which are paid by crediting the bank and charging the drawers on the books, fail to increase the cash in its possession and form no basis for a preferential payment to the depositor."

In *City Bank* vs. *Blackmore,* 75 Fed. 771 C. C. A. 6th Cir., a preferential claim of $5,000 was sought against the Commercial Bank on the following facts. The City Bank was a depositor with the Commercial Bank. It deposited a draft on a firm in New York to its credit in the Commercial Bank, for $5,000. The Commercial Bank forwarded this draft to its correspondent in New York, to which correspondent the

Commercial Bank was indebted. The Commercial Bank became insolvent. The correspondent New York Bank applied the draft on a balance owing from the Commercial Bank to it. The City Bank then claimed a preference against the receiver of the insolvent Commercial Bank. Judge Taft, in delivering the opinion of that court, said:

"The sole question is therefore whether the credit thus secured by the Commercial Bank and its receiver by the draft entitles the City Bank to take $5,000 out of the assets held by the receiver. The question must certainly be answered in the negative in any view which can be taken, *unless it appears that the assets were increased* $5,000 *by the credit, or* that the claims against them were so decreased that there was $5,000 *more for distribution among those who remained creditors* after the credit than there would have been had no credit been given to the Commercial Bank for the draft. This does not appear. If no such credit had been allowed by the National Bank of the Republic, it merely would have been a claimant for $5,000 more, and would have been entitled, not to $5,000 in full, but only to pro rata dividends on that amount. The benefit to the general fund from the draft therefore is limited to the amount of dividends payable on $5,000, and that amount the receiver has already allowed the City Bank. It has no ground for complaint, therefore. No authority has been cited to show that a claim founded on fraud is entitled to a priority over other claims. It is only where, by a rescission of the contract out of which the claim arises on the ground of fraud, that the specific thing parted with, or its proceeds, can be sufficiently identified to be returned, that fraud seems to give a priority of distribution. It may not be necessary to show earmarks upon the proceeds of the thing part-

ed with to justify such a remedy, *but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit.*"

The same court, in *Board of Commissioners* vs. *Strawn,* 157 Fed. 49, said:

"This side of the rule is peculiarly sound when it is sought to obtain an advantage in the distribution of the assets of an insolvent national bank. So long as the claim to advantage is bottomed upon the fact that the receiver has received money or property into which the money of the claimant is shown to have come into the hands of the receiver are shown to have been augmented by the receipt of the trust fund or its actual proceeds, other creditors should not complain if that is returned to which neither the bank nor its receiver had any just title."

In that case it was admitted that a trust fund existed. The difficulty was in following it. Some of it was made up of mere items of bookkeeping, where credit was transferred from one depositor to the trust claimant, and did not involve any actual payment of money out of the funds of the bank. The right of preference was denied.

The Circuit Court of Appeals for the Second Circuit in *American Can Co.* vs. *Williams,* 178 Fed. 420, had this question before it. In the *Williams* case numerous claims were asserted as entitled to preference. Among these claims was the amount of certain drafts credited by the Fredonia Bank (after-

wards insolvent) to the claimant, but which drafts were paid by the drawee's check on the Fredonia Bank, it therefore amounting to a mere item of bookkeeping, whereby one depositor was charged with the amount of the draft and the claimant's deposit credited with a like amount, *there being no actual cash paid into the bank.* Right of preference was denied. That court said:

"If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has and the trustee had assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate."

The decision of the lower court in this case is found in 176 Fed. 16. In speaking of the above transaction of debiting the drawees of the draft and the crediting of a like amount to the claimant, the lower court said:

"No money actually came into the bank's possession as the result of the payments of the drafts, and in each instance they were accepted by the drawee, whose deposits were correspondingly reduced. * * * * The general assets of the bank by the stated method of paying the drafts was not augmented or increased, and there was no addition thereto by debiting the drawees, between whom and the insolvent bank there existed debtor and creditor relations. Although the insolvent bank may have discharged its liabilities to such depositors, yet nothing tangible came to the receiver. His resources were not increased, and by such bookkeeping transreferences nothing passed to him which was capable of being set apart or which could be identified."

See also *Peters* vs. *Bain,* 133 U. S. 670; *Lucas County* vs. *Jamison,* 170 Fed. 338.

Let us suppose that prior to August 1914 the bank had only three depositors, all of whom on the same day deposited and received certificates of deposit as follows: A, $1,000; B, $1,000; and Sundquist $3,000; that thereupon Sundquist withdrew in cash $604.00 and had left three certificates of $1,000, $100, and $1,296 respectively; that then the bank fails, with total assets all in cash of $1,500. Its total liabilities would be $4,396, $1,000 to A, $1,000 to B, and $2,396 to Sundquist. If Sundquist is entitled to a preference for the $1,296, there will be only $204 for distribution to general creditors, or $68 to A, $68 to B, and $1,364 to Sundquist. A and B are both innocent parties, without fault, but by allowing Sundquist's claim in full, A and B would be deprived of a fund to which they are equitably entitled upon the ratable distribution of the insolvent's assets. True the bank wronged Sundquist, but it wronged all its depositors. It did not fulfil its promise to pay the amount of their deposits on demand.

Burden of Proof.

From what has been said, it will appear that the burden of proof of establishing and tracing a trust fund is on the claimant. The certificate for $1,296

was issued by the bank on August 31. The record is silent *as to what cash was in the bank at that time* or at any other time up to September 21, when the bank failed. The only evidence as to cash in bank at the date of failure was that of Mr. Gilchrist, who testified that there was between $20,000 and $30,000 in the bank, as he remembered it, when the bank closed (30). There is no attempt to trace this supposed trust fund into any other asset than cash. There is no showing that there was maintained in the vaults of the bank *a sum equal to or in excess of* $1,296 *from August* 31 *to September* 21. There is no showing but what in the interval between those dates the cash balance in the bank was nothing. *The burden of establishing the fund, showing that it was maintained and finally passed into the hands of the receiver, is upon the plaintiff.*

In the *Beard* case it was said that it could not be established "as a matter of inference." The testimony in favor of the claimant must be *clear* and *convincing.* In *In re Brown,* 193 Fed. 24, there was an attempt by the claimant to trace a trust fund of some $1,000. It was shown that the fund which came into the trustee's hands as unexpended was over $2,000. The referee had found that the "opening and closing balances in the Hanover Bank on and after August 13 were largely in excess of these (two deposits)."

The Circuit Court of Appeals, however, page 26, said that this finding was not sufficient.

"There is no reason why it should be *assumed* that these balances were being reserved because they represented trust money of the Princeton Bank rather than because they represented trust money of Simpson or Scrotton, or any of the other similarly situated claimants enumerated above, or indeed any of the other claimants who from time to time have appeared in this proceeding seeking to trace and recover the property converted by the bankrupts. Moreover, it is not enough to show that there were morning and afternoon balances for several successive days large enough to cover the amount of money which was improperly converted. It might very well be that in any one day checks were presented which exhausted the morning balance and its accretions, in which event these moneys would have been dissipated. We are not prepared to assent to a proposition that subsequent deposits are to be taken as having been made to make good claimant's money thus drawn and spent. Board of Commissioners vs. Strawn, 157 Fed. 51. Our own conclusion would be that the $1,757.50 of proceeds of the claimant's stock which went into the Hanover Bank on August 13 has not been shown to be any part of the balance which was turned over by the bank to the trustee on September 5. * * * Surely there can be no presumption, *in the absence of testimony* and in the face of these other claims, that $1,757.50 of the balance was claimant's money."

That court concluded as follows:

"The burden of proof is on the claimant at the outset. It rests upon him at the close of the case."

The *Brown* case was affirmed in the Supreme Court of the United States, sub nom *Schuyler* vs. *Lit-*

tlefield, 232 U. S. 707. In discussing the question of the burden of proof, the Supreme Court said:

"Like all other persons similarly situated, they (the claimants) were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, that doubt must be resolved in favor of the trustees, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them the appellants must be remitted to the general fund."

FORM OF DECREE.

It is submitted that the form of decree in this case is objectionable. It provides for a money judgment in favor of Sundquist against the Receiver (33), and directs the Receiver to "forthwith pay" Sundquist the sum of $1,296.00 with costs and disbursements (34).

Denton v. *Baker,* 79 Fed., 189, C. C. A. 9th Cir.

See also *Richardson* v. *Louisville Banking Company,* 94 Fed., 442, C. C. A., 5th Cir.

In conclusion there could hardly be presented to the court a simpler case than the one at bar for the disallowance of a preferential claim. In order to create a special deposit it would be necessary to resort to mere bookkeeping entries and disregard the *facts.* To establish a trust fund in the possession of this receiver belonging to Sundquist it would be necessary to assert a doctrine that every creditor of an insolvent bank has a lien in *all* its assets for the security of his claim, a doctrine without authority in any Circuit in this country.

Respectfully submitted,

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